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SUBJECT: AMENDMENTS TO THAI-U.S. EXTRADITION TREATY

REF: (A) 78 BANGKOK 14489, (B) 77 STATE 179937,
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1. ART II BIS, PARA 3. THE PURPOSE OF THIS PROPOSED AMENDMENT IS TO ASSURE THAT CERTAIN FEDERAL CRIMES WILL BE INTERPRETED AS EXTRADITABLE OFFENSES WITHIN THE MEANING OF ARTICLE II. WHAT IS A FEDERAL CRIME? UNDER THE CONSTITUTION CERTAIN POWERS ARE GRANTED TO THE FEDERAL GOVERNMENT WITH REMAINING POWERS RESERVED TO THE STATES. THE ENUMERATED POWERS OF THE FEDERAL GOVERNMENT ARE SET OUT IN THE EIGHTH SECTION OF ARTICLE I OF THE CONSTITUTION. CONGRESS IS THUS, IN ALIA, EMPOWERED TO: "REGULATE COMMERCE WITH FOREIGN NATIONS AND AMONG THE SEVERAL STATES..."; "ESTABLISH POST OFFICES..." ARTICLE I ALSO PROVIDES THAT CONGRESS MAY "MAKE ALL LAWS WHICH SHALL BE NECESSARY AND PROPER FOR
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CARRYING INTO EXECUTION..." SUCH POWERS. GENERALLY, LAWS RELATING TO CRIMINAL BEHAVIOR ARE PROMULGATED BY THE STATES. HOWEVER, IN CERTAIN AREAS WHERE THE FEDERAL GOVERNMENT HAS COMPETENCE VIS-A-VIS AN ENUMERATED ARTICLE I, SECTION 8 POWER, CONGRESS MAY ALSO PROMULGATE LAWS WHICH PROHIBIT CERTAIN KINDS OF CRIMINAL BEHAVIOR. CONGRESS MAY REGULATE

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COMMERCE AMONG THE STATES" (REFERRED TO AS INTERSTATE COMMERCE) TO THE EXTENT OF FORBIDDING AND PUNISHING THE USE OF SUCH COMMERCE AS AN AGENCY TO PROMOTE IMMORALITY, DISHONESTY, OR THE SPREAD OF ANY EVIL OR HARM TO THE PEOPLEOF OTHER STATES. PROCEEDING ON THIS BASIS, CONGRESS HAS PROHIBITED THE KIDNAPPING OF A PERSON WHO IS WILFULLY TRANSPORTED IN "INTERSTATE COMMERCE" (18 USC 1201). THE "TRANSPORT IN INTERSTATE COMMERCE" IS THE JURISDICTIONAL BASIS WHICH ALLOWS THE FEDERAL GOVERNMENT TO PROHIBIT A CERTAIN TYPE OF CRIMINAL BEHAVIOR. (RECALL THAT THE PROMULGATION OF LAWS RELATING TO THE PROHIBITION OF CRIMINAL BEHAVIORIS NORMALLY A POWER RESERVED TO THE STATES.) PROPOSED ART II BIS, PARA (3) STATES THAT, "EXTRADITION SHALL ALSO BE GRANTED FOR ANY EXTRADITABLE OFFENSE WHEN, ONLY FOR THE PURPOSE OF GRANTING JURISDICTION TO THE UNITED STATES GOVERNMENT, TRANSPORTATION, TRANSMISSION OF PERSONS OR PROPERTY, USE OF THE MAILS AND OTHER MEANS OF CARRYING OUT INTERSTATE OR FOREIGN COMMERCE IS ALSO AN ELEMENT OF THE SPECIFIC OFFENSE." TO REPEAT, IN THE KIDNAPPING EXAMPLE, WHICH WAS INTENDED TO BE ILLUSTRATED BY THE CASE AT 6 WHITEMAN P. 790, "TRANSPORT IN INTERSTATE COMMERCE" RELATES ONLY TO JURISDICTION. IF ARTICLE II BIS IS IN EFFECT IN THE US-THAI EXTRADITION TREATY THE USG COULD REQUEST EXTRADITION OF A FUGITIVE CHARGED OR CONVICTED OF KIDNAPPING A MINOR "IN INTERSTATE COMMERCE". IN SUCH A UNCLASSIFIED

CASE THE FUGITIVE COULD NOT SUCCEED BY ARGUING THAT THE CRIME HAS AN ADDITIONAL SUBSTANTIVE ELEMENT NOT COVERED IN THE OFFENSE LISTED AT ITEM 17, ARTICLE II OF THE TREATY.

2. ANOTHER EXAMPLE OF A FEDERAL CRIME WHICH HAS A JURISDICTIONAL ELEMENT IS "MAIL FRAUD" (18 USC 1341). THIS CRIME REQUIRES THAT THE GOVERNMENT PROVE THAT A PERSON OBTAIN MONEY OR PROPERTY BY FALSE PRETENSES BY THE USE OF THE U.S. MAILS. IN THIS CASE, THE JURISDICTIONAL ELEMENT (THAT WHICH ALLOWS THE FEDERAL GOVERNMENT TO PROMULGATE A CRIMINAL LAW) IS THE "USE OF THE MAILS." RECALL THAT THE FEDERAL GOVERNMENT IS EMPOWERED TO ESTABLISH AND MAINTAIN A POSTAL SERVICE PURSUANT TO ARTICLE I, SECTION 8 OF THE CONSTITUTION, AS WELL AS MAKE LAWS WHICH ARE NECESSARY AND PROPER FOR CARRYING OUT THIS POWER. CONGRESS ARGUABLY WOULD NOT HAVE THE AUTHORITY TO PROMULGATE A LAW WHICH SHIMPLY PROHIBITS THE "OBTAINING OF MONEY...BY FALSE PRETENSE..." (SEE ITEM 19, ART II OF CURRENT US-THAI EXTRADITION TREATY). THE FEDERAL GOVERNMENT MUST HAVE A JURISDICTIONAL BASIS ON WHICH TO ENTER THE FIELD. STATES, HOWEVER, MAY AND DO PROMULGATE LAWS PROHIBITING THE "OBTAINING OF MONEY, PROPERTY, ETC... BY FALSE PRETENSES."

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FOR EXAMPLE, A FUGITIVE FROM NEW YORK STATE WHO WAS

CONVICTED OF OBTAINING MONEY BY THE USE OF THE MAILS (18 USC 1341) WOULD BE FOUND EXTRADITABLE. THE FUGITIVE MIGHT ARGUE BEFORE A THAI COURT THAT THE FEDERAL CRIME CONTAINS AN EXTRA SUBSTANTIVE ELEMENT NOT CONTEMPLATED BY THE TREATY. PROPOSED ARTICLE II, BIS WOULD RESOLVE ANY DOUBT.

3. ANOTHER EXAMPLE WHICH DEMONSTRATES THE NEED FOR ARTICLE II, BIS WAS MENTIONED IN STATE 125851, PARA 2. US REQUESTED EXTRADITION FOR FRAUD, BUT THE BAHAMAS DID NOT INTERPRET "FRAUD BY WIRE" (18 USC 1343) AS A FRAUD WITHIN THE MEANING OF THE APPLICABLE EXTRADITION TREATY IN
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THE VESCO CASE. IN ESSENCE, THE COURT THERE DID NOT ACCEPT THE USG ARGUMENT THAT THE USE OF THE "WIRES" IN THE FRAUD WAS ONLY A JURISDICTIONAL ELEMENT. VESCO EXAMPLE CITED ONLY BECAUSE RECENT AND PUBLIC INFORMATION. STILL ANOTHER EXAMPLE IS CITED AT 6 WHITEMAN PAGE 775 WHERE CANADA DENIED EXTRADITION OF A FUGITIVE FOR LARCENY BE-CAUSE US FEDERAL CRIME WAS THEFT FROM INTERSTATE SHIPMENT.

4. IT IS FOR THE REASONS DISCUSSED IN PARAS 1-3, ABOVE, THAT ARTICLE II, BIS, IS INCLUDED IN THE AMENDMENTS TO THE TREATY. THE NEED FOR THE PARTICULAR LANGUAGE REFLECTS THE COMPLEX PROBLEMS OF DIVISION OF POWERS ASSOCIATED WITH THE USG FEDERAL CONSTITUTIONAL SYSTEM.

5. THE PROBLEM WITH THAI PROPOSAL MENTIONED IN PARA 4 OF REFTEL A IS THAT OUR 50 STATES HAVE WIDELY VARYING CRIMIN-AL LAWS, AND AN ACT MAY BE AN OFFENSE IN ONE OF THEM BUT NOT GENERALLY, NOR IN THAILAND, AND WHOLE EXTRADITION PROCESS MAY BE NECESSARY TO DETERMINE WHETHER OFFENSE IS EXTRADITABLE. SCHEDULE OF OFFENSES AVOIDS THAT PROBLEM. WE ARE WILLING TO ADD PROVISION THAT EXTRADITION SHALL ALSO BE GRANTED FOR THE "ATTEMPT TO COMMIT AN OFFENSE; CONSPIRACY TO COMMIT AN OFFENSE; OR THE PARTICIPATION IN THE EXECUTION OF AN OFFENSE" COVERED BY THE TREATY.

6. REFERENCE PARA 5 OF REFTEL A. DEPARTMENT UNDERSTANDS CONFUSION ON PART OF MFA WITH RESPECT TO ALLOCATION OF COSTS ASSOCIATED WITH US-THAI EXTRADITIONS. USG WILL NOT, RPT NOT ASSUME COSTS OF TRANSPORTING A FUGITIVE FROM THE US TO THAILAND. THIS "FORMULA" REACHES SAME RESULT AS ARTICLE XX OF US-ITALY EXTRADITION TREATY. (NOTE: PARA 3 OF ARTICLE XX DOES NOT PROVIDE THAT THE USG WILL ASSUME THE COSTS OF TRANSPORTING FUGITIVE TO THE REQUESTING
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STATE.) DEPTEL 125851 ALSO DEALT WITH COSTS OF REPRESEN-
TATION AND INCARCERATION. WHEN IT SAID THERE ARE NO LEGAL
CHARGES, IT WAS MERELY INTENDED TO SAY THAT IF USG

REPRESENTS THAILAND (THROUGH JUSTICE DEPARTMENT) GOVERNMENT
LEGAL OFFICERS DO THE WORK AS PART OF THEIR OFFICIAL
RESPONSIBILITY AND MAKE NO SPECIAL CHARGE. IN ABSENCE OF
PROVISION FOR USG LEGAL REPRESENTATION, HOWEVER, THAILAND
WOULD HAVE TO HIRE AND PAY PRIVATE COUNSEL. IF THAIS
PREFER WORDING OF ARTICLE XX OF ITALY TREATY, WE WOULD
HAVE NO OBJECTION, SINCE RESULT IS SAME.

7. PLEASE ADVISE DEPARTMENT ON FURTHER DEVELOPMENTS. VANCE

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